COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of January 4-5, 2001
Tucson, Arizona

Minutes

The winter meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in Tucson, Arizona on Thursday and Friday, January 4-5, 2001. The following members were present:

Judge Anthony J. Scirica, Chair
Honorable Michael Boudin
Honorable Frank W. Bullock, Jr.
Honorable Sidney A. Fitzwater
Gene W. Lafitte
Patrick F. McCartan
Honorable J. Garvan Murtha
Honorable Thomas W. Thrash, Jr.

The Department of Justice was represented at the meeting by Roger A. Pauley, Director (Legislation) of the Office of Legislation and Policy. Former member, Professor Geoffrey C. Hazard, Jr. also participated. Judge Tashima, Chief Justice Wells, Dean Kane, Mr. Cooper, and Mr. Bernick were unable to attend the meeting.

Providing support to the committee were: Professor Daniel R. Coquillette, reporter to the committee; Peter G. McCabe, secretary to the committee; John K. Rabiej, chief of the Rules Committee Support Office of the Administrative Office of the U.S. Courts; Nancy Miller, special counsel in the Office of Judges Programs of the Administrative Office; and Christopher F. Jennings, assistant to Judge Scirica.

Representing the advisory committees were:

Advisory Committee on Appellate Rules —
Judge Will L. Garwood, Chair
Professor Patrick J. Schiltz, Reporter
Advisory Committee on Bankruptcy Rules —
Judge A. Thomas Small, Chair
Professor Jeffrey W. Morris, Reporter
Advisory Committee on Civil Rules —
Honorable David F. Levi, Chair
Professor Edward H. Cooper, Reporter
Advisory Committee on Criminal Rules —
Honorable W. Eugene Davis, Chair
Professor David A. Schlueter, Reporter

Advisory Committee on Evidence Rules —
Honorable Milton I. Shadur, Chair
Professor Daniel J. Capra, Reporter

Also taking part in the meeting were: Joseph F. Spaniol, Jr. and Professor R. Joseph Kimble, consultants to the committee; Professor Mary P. Squiers, Director of the Local Rules Project; and Marie C. Leary of the Research Division of the Federal Judicial Center.

INTRODUCTORY REMARKS

Judge Scirica welcomed Judges Thrash and Fitzwater to the committee and congratulated Judges Levi and Small on their recent appointments as advisory committee chairs. He expressed regret that the terms of Chief Justice Veasey, Judge Kravitch, and Professor Hazard had expired, and he extolled their many contributions to the work of the committee.

Judge Scirica reported that the Judicial Conference at its September 2000 meeting had approved, on its consent calendar, all the committee's proposed amendments to the rules. He added that he and Judge Niemeyer had informed the Conference's district judge representatives about the proposed rule change that would require corporate parties to disclose parent corporations and any corporation owning 10% or more of their stock. He said that the representatives appeared to be favorably inclined towards the proposal, but asked why the amendment did not also require disclosure of subsidiaries.

Professor Schiltz explained that the Advisory Committee on Appellate Rules had deleted from FED. R. APP. 26.1 the requirement that subsidiaries be disclosed because it simply was not necessary. Litigation affecting a subsidiary necessarily affects the parent. But litigation affecting the parent does not necessarily affect a subsidiary. Some parents, moreover, may have hundreds of subsidiaries, but subsidiaries generally do not have multiple parents.

APPROVAL OF THE MINUTES OF THE LAST MEETING

The committee voted without objection to approve the minutes of the last meeting, held on June 7-8, 2000.

REPORT OF THE ADMINISTRATIVE OFFICE

Legislation

Mr. Rabiej reported that a great deal of legislative activity had occurred in the closing days of the 106th Congress on bills that would impact the federal rules.

The Federal Courts Improvement Act of 2000, signed into law on November 11, 2000, extended limited contempt power to magistrate judges and made changes in their misdemeanor authority. Mr. Rabiej said that the statute will require conforming rule amendments, and he reported that the Advisory Committee on Criminal Rules was reviewing the Act to determine whether the conforming changes could be approved without publication.

Mr. Rabiej reported that Senator Kohl had again introduced legislation requiring judges to make particularized findings that no danger exists to public health or safety before they may issue a protective order. He said that the senator had also attempted to attach the legislation to other bills before the Senate Judiciary Committee. Judge Scirica added that the rules committees have examined the issue on several occasions and have determined that the proposal is without merit. Nevertheless, he said, the Advisory Committee on Civil Rules may have to deal with the matter again. Judge Levi responded that the issue is not on the committee's agenda.

Mr. Rabiej reported that the House had passed the Interstate Class Action Jurisdiction Act, which would channel most class action cases to the federal courts by establishing minimal diversity jurisdiction. He said that the Senate Judiciary Committee had favorably reported the bill, but the full Senate had not taken action on it. He added that class action legislation would be introduced again in the new Congress. He noted that the Judicial Conference opposes the legislation in its present form on grounds that: (1) it would impose additional workload on the federal courts; and (2) it would federalize cases rightly belonging in the state courts.

Mr. Rabiej reported that legislation had passed both houses of the 106th Congress to "fix the *Lexecon* problem" and allow a transferee judge in a multi-district litigation panel case to retain cases for trial. But there were differences between the House and Senate versions of the bill, which were not eliminated before adjournment. He said that legislation, which was supported by the Judicial Conference, would be introduced again in the 107th Congress.

Mr. Rabiej pointed out that a provision embedded in a lengthy House bill dealing with methamphetamine offenses would amend FED. R. CRIM. P. 41 directly to allow federal law enforcement officers to search for intangible property without providing

notice. He said that Judge Scirica had written a letter to Congress stating the judiciary's concerns that the legislation: (1) would undercut the Rules Enabling Act process; and (2) differed in substance with a proposed amendment to Rule 41 allowing "sneak and peak" searches, but requiring that post-search notice be given to the owner of the premises. He pointed out that the committee's efforts had been successful because the methamphetamine provision was later added to pending bankruptcy and child healthcare bills, but without the troublesome search provision.

Mr. Rabiej reported that the Military Extraterritorial Jurisdiction Act of 2000 allows a magistrate judge to conduct an initial appearance by telephone when an offender is arrested by the military in a foreign country. He said that the legislation will require a minor amendment to the criminal rules.

Mr. Rabiej reported that the omnibus bankruptcy reform legislation contained a provision redirecting all appeals from bankruptcy judges to the courts of appeals, rather than to the district courts and bankruptcy appellate panels. He noted that the Judicial Conference had succeeded in getting this provision changed. The successor, substitute provision would direct all appeals to the court of appeals if a district judge does not act on them within 30 days. The Conference, he said, also opposes the substitute provision, but it could not get it removed from the legislation. The Congress adjourned, however, without enacting any bankruptcy legislation.

Judge Scirica said that the issue of direct appeals in bankruptcy cases is very much alive and would be considered in the 107th Congress. Mr. Rabiej noted that the position of the Judicial Conference is that appeals from bankruptcy judges should normally be taken to the district court or a bankruptcy appellate panel, but the court of appeals should have discretion to take a direct appeal from a bankruptcy judge if it is in the interests of justice or contains an important issue of public policy.

Judge Small noted that the major bankruptcy legislation would likely be enacted in the 107th Congress and would require extensive work by the Advisory Committee on Bankruptcy Rules to amend the rules and official forms.

Administrative Actions

Mr. Rabiej reported that the scheduled public hearings on the proposed amendments to the civil and appellate rules had been canceled for lack of witnesses and that two of the three hearings on the proposed amendments to the criminal rules had been canceled. He added that the hearings on the proposed amendments to the bankruptcy rules would be held as scheduled.

Mr. Rabiej said that the committee and the Administrative Office had been successful in getting courts to post their local rules on the Internet. He noted that the Court Administration and Case Management Committee had agreed with the committee's views and had added a recommendation to the Judicial Conference that rules be posted by July 1, 2001.

REPORT OF THE FEDERAL JUDICIAL CENTER

Ms. Leary referred the members to a list of pending Federal Judicial Center projects set out in Agenda Item 4. She pointed specifically to the new District Court Time Study, which will eventually lead to revised case weights for evaluating additional judgeship needs. Ms. Leary said that the Center had convened an advisory group of district judges and prepared an initial design for the study. The study, which will take about three to four years to complete, calls for a sample of judges to keep records of their time. Several members offered suggestions to improve the methodology of the study. Ms. Leary promised to convey their views to the research staff at the Center and report back to the committee.

Ms. Leary also reported that the Center and the Administrative Office had been developing a civil litigation management manual at the request of the Court Administration and Case Management Committee. The manual is required by section 479 of the Civil Justice Reform Act. She added that the full draft of the manual had been approved by an advisory group of judges and the Court Administration and Case Management Committee. It would be presented to the Judicial Conference at its March 2001 meeting and then distributed to all judges and posted on the judiciary's J-Net intranet site.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Garwood presented the report of the advisory committee, as set forth in his memorandum and attachment of November 30, 2000. (Agenda Item 5)

Judge Garwood reported that the advisory committee had no action items to present. He said that the committee did not have a fall meeting because no new items required action. He noted that the committee had received a few comments on the package of 28 amendments published in August 2000. He said that these comments would be considered at the committee's April 2001 meeting, as well as a number of interesting new matters.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Small and Professor Morris presented the report of the advisory committee, as set forth in Judge Small's memorandum and attachment of November 30, 2000. (Agenda Item 6)

Judge Small reported that the advisory committee had no action items to present. He noted that the committee had published proposed amendments to seven rules and one official form for comment in August 2000. Few written comments had been received to date, he said, but three organizations have signed up to testify at the public hearing.

He said that the committee anticipates some controversy on two of the proposed amendments. First, Rule 2014 would be recast to require that professionals seeking court approval of their employment disclose all information relevant to determining whether they are "disinterested," as defined in § 101 of the Bankruptcy Code. He said that one assistant U.S. trustee had commented that the amended rule, compared to the current rule, would give a professional too much discretion in determining what information to disclose.

Second, Rule 9014, among other things, would extend FED. R. CIV. P. 43(a) to contested matters. The effect would be to require testimony of witnesses at an evidentiary hearing if a motion cannot be decided without resolving a disputed material issue of fact. One comment, from bankruptcy judges in the Ninth Circuit, argued that it is essential for the rule to permit direct testimony by affidavit, followed by cross examination, if necessary.

Judge Small reported that the Judicial Improvements Act of 2000 had extended the requirement of quarterly fees in chapter 11 cases to the six judicial districts covered by the bankruptcy administrator program. The advisory committee, he said, would review the rules to make sure that they accommodate the statutory change. He also reported that the committee at its next meeting would examine issues of privacy and public access presented by the new electronic case files system in the bankruptcy courts. Professor Morris added that section 342 of the Bankruptcy Code requires disclosure of debtors' names, addresses, and taxpayer identification numbers to assist creditors in pursuing their rights.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Levi and Professor Cooper presented the report of the advisory committee, as set forth in Judge Levi's memorandum and attachment of December 1, 2000. (Agenda Item 7)

Technical Amendments to the Admiralty Rules

Judge Levi reported that the proposed amendments to the admiralty rules are designed to eliminate recently created inconsistencies between the rules and the Civil Asset Forfeiture Reform Act of 2000.

Professor Cooper explained the sequence of events giving rise to the inconsistencies. He pointed out that in 1999 the advisory committee — after lengthy study and close coordination with the Maritime Law Association and the Department of Justice — had produced a package of amendments to the admiralty rules. The amendments focused largely on separating some procedural aspects of civil forfeiture proceedings, which rely on the admiralty rules, from the procedures used in traditional, *in rem* admiralty cases. They were approved by the Judicial Conference in September 1999, prescribed by the Supreme Court on April 17, 2000, and took effect on December 1, 2000.

Professor Cooper reported that the advisory committee had paid attention to forfeiture reform bills pending in Congress during the drafting stages, but it could not anticipate the precise form of the legislation that eventually came to be enacted after the rules amendments had been approved. The Civil Asset Forfeiture Reform Act, which became law on April 25, 2000, created four inconsistencies with the new rules. But, by operation of the supersession clause of the Rules Enabling Act, the rules then superseded the more recently drafted legislation on December 1, 2000.

Professor Cooper said that the sequence of events had produced unintended inconsistencies, and there was no intent on the part of the rules committees to have any policy differences with Congress. Therefore, the committee, in consultation with the Department of Justice, has prepared technical amendments to Admiralty Rule C to conform the rule to the statute.

ADMIRALTY RULE C(6)(a)(i)A)

Professor Cooper pointed out that the rule requires a person asserting an interest in or right against property subject to the action to file a statement identifying the interest or right within 20 days of either of two triggering events. The new statute, however, gives the filer 30 days, rather than 20. He said that the advisory committee has no problem with adopting the longer period, and if the advisory committee had known that Congress would favor a 30-day period, it would have specified a 30-day period in the amended Rule C(6).

Professor Cooper said that a second change in Rule C(6)(a)(i)(A) deals with the two triggering events themselves. The rule specifies as one event the time a filer receives actual notice of execution of process. The statute, though, specifies the date of service of the government's complaint. He said that the advisory committee recognizes that the two events may be different in a given case and that actual notice may be preferable. Nevertheless, he said, the advisory committee has agreed to defer to the choice made by Congress.

ADMIRALTY RULE C(6)(a)(iii) and (b)(iv)

Professor Cooper said that the next two proposed changes deal with whether a person who files a statement of interest in or right against the property must later "serve" an answer or "file" it. The rule specifies that the answer be "served," while the new statute specifies that it be "filed." Professor Cooper pointed out that the provisions are not necessarily inconsistent, since the rules require that all papers after the complaint be filed with the court within a reasonable time after service. Rule C(6)(a)(iii) would be changed to require both service and filing within 20 days.

ADMIRALTY RULE C(6)(b)(iv)

Professor Cooper noted that the rule requires a person to "file" an answer within 20 days after filing the statement of interest or right. Since answers are "served," rather than "filed," the advisory committee would change the rule to conform with FED. R. CIV. P. 12(a).

ADMIRALTY RULE C(3)(a)(i)

Professor Cooper reported that the rule requires the clerk to issue a summons and warrant for the arrest of forfeiture property. The new statute, though, specifies that real property subject to civil forfeiture "shall not be seized before entry of an order of forfeiture." Therefore, the arrest provision in Rule C(3)(a)(i) is too broad, and an exception to the warrant requirement is needed to reflect the new statute. The advisory committee proposes that the exception state that "if the property is real property the United States must proceed under applicable statutory procedures."

Professor Cooper asked whether it is wise or useful to publish any or all of the proposed amendments for comment since they are designed merely to implement the new statute. The Advisory Committee on Civil Rules had voted at its October 2000 meeting to recommend approval of one change as a technical amendment without publication, but to publish the others changes for comment. Professor Cooper noted that the Department of Justice was of the view that all the amendments should be approved without publication.

Mr. Pauley thanked the advisory committee on behalf of the Department for promptly addressing the discrepancies between the rules and the statute. He said that it is important for the proposed rules amendments to take effect as soon as possible. He added that the committee would not be criticized if it were to bring the rules into conformity with the statute without public comment. The divergence of the rules from the statute, he said, is purely unintentional.

Mr. Pauley pointed out that the new civil forfeiture legislation is controversial and had been bitterly contested. He emphasized that Congress had heard all sides and had made a number of policy choices that the rules process should respect. He suggested that if the committee were to seek public comment on the proposed amendments, it would likely receive comments from the criminal defense bar and other organizations supporting the current version of the rules, rather than the conforming amendments. He said that the Department of Justice would support the statutory provisions. Therefore, the rules committees would face a replay of the same policy disputes just resolved by the legislature.

Judge Scirica asked whether there would be a perception of unfairness if the committee did not publish the proposed amendments. Judge Levi responded that the only amendment that might raise some concern is Rule C(6)(a)(i)(A), changing the time for a person to file a statement asserting a property right from 30 days after receiving actual notice of execution of process to 30 days after the date of service of the government's complaint. The effect of the provision, he said, may shorten the pertinent time period. But, he added, the criminal defense bar has not commented on the matter. Moreover, the other amendments are either friendly to the defendant or purely technical in nature.

Mr. Pauley pointed out that there are two issues: (1) the time limits; and (2) the triggering events. Congress, he said, had considered and decided both. On the one hand, it had increased the time limits from 20 to 30 days. On the other, it had shortened the time period by changing the triggering event from actual notice to government service. The changes, he said, are interconnected and part of a package. Therefore, if any of the amendments are published, they should all be published. But, he suggested, there is no reason for further public comment, since publication would hold out the false hope that the rules committees might vote to overturn the statute. He added that there was little realistic chance that the committees would reopen issues that had just been carefully decided by Congress.

Mr. Rabiej explained that if the amendments were approved without publication, they could be presented to the Judicial Conference in March 2001. The Supreme Court could then act on them by May 1, and they would take effect on December 1, 2001. On the other hand, he said, if the amendments are not presented to the Conference until its September 2001 meeting, they would take effect on December 1, 2002.

Some members suggested that there is little practical reason to publish. Nevertheless, they said that failure to publish would subject the committee to potential criticism. One member added that opponents of the amendments might lobby the Judicial Conference and the Supreme Court, complaining that the committee had not provided them an opportunity for comment and had not carefully considered all views.

Judge Scirica said that the committee needed to choose between:

1. adopting all four technical amendments without publication, sending them to the Judicial Conference in March 2001, asking the Supreme Court to act by May 1, 2001, and having them take effect on December 1, 2001; or

2. publishing the amendments for an abbreviated period of about two months, sending them to the Conference in September 2001, asking the Court to act by May 1, 2002, and having them take effect on December 1, 2002.

He pointed out that the committee enjoyed great credibility with the Conference and a reputation for being very careful and deliberative. He said that the choice of options was a close call, but he preferred the second option because it would best preserve and protect the rules process. He added that the committee should also write letters to the House and Senate judiciary committees explaining the committee's actions.

Mr. Pauley moved to approve the proposed amendments without publication (Option 1 above). The motion failed for lack of a second.

Mr. Lafitte moved to publish the rules for an abbreviated period of time (Option 2 above). The motion was approved by voice vote.

Informational Items

Judge Levi reported that the advisory committee is engaged in a number of special projects that may lead to the presentation of proposed rules amendments at the next standing committee meeting.

CLASS ACTIONS - FED. R. CIV. P. 23

Judge Levi stated that the advisory committee has been examining class actions since 1991. Its earlier efforts had resulted in publication of a package of proposed amendments to Rule 23 addressing such controversial matters as settlement classes and the standards for certifying a class. But the public comments and hearings produced

substantial opposition to some of the proposals, particularly from academic sources. As a result, he said, the committee went forward to the Judicial Conference with only one item from the package — new subdivision 23(f), authorizing interlocutory appeals of decisions granting or denying class certification. He said that Rule 23(f), which took effect in 1998, is working very well.

Judge Levi emphasized that it has been very difficult to make politically acceptable changes in Rule 23. Many competing, powerful interests have a stake in the outcome, and the stakes are high. Nevertheless, he said, some reforms are needed, and the advisory committee will proceed carefully to build a consensus for them. The RAND corporation, for example, published an important study concluding that more judicial oversight is needed in class actions. It also reported that there is a new paradigm in class actions, with discrete classes represented by a single lawyer being replaced by overlapping class actions, lawyers representing both the class and people outside the class, committees of lawyers, and competing courts.

Judge Levi pointed out, too, that Congress is contemplating class action legislation. Bills were debated in the last Congress that would channel national class actions into the federal courts by allowing federal class actions to proceed with minimal diversity jurisdiction. The Senate report on the legislation asked the Judicial Conference to study attorney fees and propose solutions to existing problems in that area. He noted that the Federal-State Jurisdiction Committee is exploring overlapping class actions and nationwide state-court class actions, and the Bankruptcy Committee is continuing to look at mass torts.

Judge Levi said that the advisory committee is actively considering amendments to Rule 23 under the leadership of a hard-working subcommittee chaired by Judge Lee Rosenthal (S. D. Tex.). He noted that the committee is no longer considering rules amendments on the standards for class certification. Rather, it is focusing on such matters as settlement, attorney fees, representation, and overlapping classes. Among the suggestions it is exploring are:

- an amendment to rule 23(c)(1) omitting the language that certification be decided “as soon as practicable”;

- an amendment specifying that once a court certifies a class action, other courts may not certify one;

- a provision authorizing sampling notice in small-stakes cases where the cost of notice is high in relation to individual recoveries;

- amendments to Rule 23(e) specifying the standards and procedures for approving settlements, including a hearing and disclosure of side agreements;

- a provision giving parties an opportunity to opt out after the terms of a settlement are announced;

- a provision dealing with objectors and addressing such issues as their standing and their fees;

- a provision specifying that the refusal of a judge to approve a settlement precludes approval of the settlement by another court;

- a provision governing attorney appointments specifying an application process and requiring that an attorney represent the class as a whole; and

- a provision on attorney fees requiring that compensation be related to the results actually achieved and providing criteria for a judge to determine the appropriateness of fees.

Professor Cooper pointed out that these provisions are under active study, but some of them may not in fact be recommended by the subcommittee or the advisory committee. He added that additional topics under study include:

- a proposed change in the current requirement that to appeal an objector must win intervention in the trial court or reversal of the denial of intervention in the court of appeals;

- an amendment to regulate notice in Rule 23(b)(1) and (b)(2) class actions;

- a provision to control overlapping, competing, and duplicating class actions — if a rule is feasible, independent of legislation; and

- a provision prohibiting an attorney from simultaneously negotiating attorney fees and class relief.

Several of the members expressed strong support for the work of the advisory committee and said that class actions are badly in need of reform. Judge Scirica said that even though some of the proposals may be controversial, the advisory committee should be given a presumption in favor of publishing their recommendations for comment. He added, though, that alleviating the continuing problem of overlapping class actions may require a Congressional solution.

One member pointed out that class actions involve an extremely complex set of interconnected problems, some of which can be resolved only by legislative action. He applauded the work of the advisory committee and invited it to recommend complete solutions to class action problems, rather than a limited set of proposals confined by the constraints of the Rules Enabling Act. He suggested that the advisory committee recommend to the standing committee whatever needs to be done, whether strictly procedural or substantive. If the advisory committee concludes that it cannot proceed with some changes because of Rules Enabling Act limitations, it should nevertheless identify them and recommend appropriate legislative solutions.

SPECIAL MASTERS - FED. R. CIV. P. 53

Judge Levi said that Rule 53, dealing with special masters, is badly out of date. He noted that the rule is designed for trial masters, and does not address the use of masters for pretrial matters, discovery supervision, and post-trial matters. The rule also fails to address many of the mechanics governing the use of masters. He pointed out that Professor Cooper and an ad hoc subcommittee of the advisory committee have studied Rule 53 and have prepared a draft rewrite of the rule to take account of the current use of special masters.

Professor Cooper explained that the study of special masters is a work in progress. He noted that the advisory committee had asked the Federal Judicial Center to conduct an empirical study on the contemporary uses of special masters in the district courts. In its report, the Center found that masters are widely used in the courts, notwithstanding the restrictions imposed by Supreme Court decisional law.

Professor Cooper reported that the committee is considering a wide range of issues, including such matters as the use of special masters in jury cases, the use of special masters vis a vis magistrate judges, ex parte communications between masters and the court or parties, and elimination of unnecessary or dated details from the current rule.

JURY INSTRUCTIONS - FED. R. CIV. P. 51

Judge Levi said that the current Rule 51 is anachronistic, in that it is based on the assumption that the lawyers will hear jury instructions for the first time from the judge on the bench. The rule also states that parties may ask the court for proposed instructions, and the court must inform them of its proposed action on their requests. In practice, though, most judges inform counsel before the close of argument, or earlier, what their instructions will be and give the lawyers a chance to comment on them. Judge Levi said that the advisory committee is considering a substantially revised rule more in keeping with current practice. Among other things, it will allow courts to ask for proposed instructions before trial and will specify the procedures for the parties to make objections.

COMPUTER-GENERATED DISCOVERY

Judge Levi reported that the advisory committee is exploring the problems posed by the widespread and growing use of computer-generated discovery. To that end, he said, the committee had conducted productive conferences with a broad cross-section of the bar in San Francisco and Brooklyn. He pointed out that the committee was approaching the matter the way it typically begins its work — by consulting with the bench and bar, and by asking the Federal Judicial Center to conduct a study.

Judge Levi explained that the principal problems cited by the bar fall into two categories. First, *retrieval of discovery materials* in electronic format raises such difficult issues as to how extensively a responding party must search its records, how much information it must gather when records are located in many different computer systems and formats, how to deal with data contained in legacy systems no longer in use, whether special efforts are required to retrieve deleted materials and embedded data, and how to control or apportion search costs when special or heroic efforts are required to extract data. Second, *spoliation of discovery materials* raises serious concerns on the part of the bar. There is apparently a good deal of confusion regarding the obligation of parties to preserve and protect information that is the subject, or potential subject, of discovery.

Judge Levi said that the advisory committee did not expect to present any rules proposals for a while, if ever. It is not clear, moreover, whether there are in fact rule-based solutions to the types of problems identified by the bar. Professor Cooper added that it would not be possible to draft a rule specifying with precision the scope of an electronic search because information technology is changing rapidly. There is a burgeoning industry of consultants in computer-based discovery materials. Moreover, search capabilities are expanding rapidly, and the cost of retrieval is declining. He noted that discovery information is often widely disseminated throughout an organization because of e-mail and networks. And there may be many copies or versions of the same information residing on different machines. He concluded that our whole understanding of discovery is likely to change over the next several years.

SIMPLIFIED PROCEDURES

Judge Levi reported that the advisory committee has been studying the feasibility of having a set of simplified procedures that could be used in certain types of cases, particularly small cases. He said that Professor Cooper had prepared a first draft of simplified procedures providing for limited discovery, mandated disclosure, limited discovery, and a quick trial date. He added that three district judges had been invited to the last advisory committee to describe the expedited procedures in their courts using the current civil rules. Judge Levi concluded that the committee has reservations about the

need for separate, simplified procedures, but it will continue to explore the concept. He did not expect any rules proposals in the near future.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Davis and Professor Schlueter presented the report of the advisory committee, as set forth in Judge Davis's memorandum and attachment of December 1, 2000. (Agenda Item 8)

Action Item

Judge Davis reported that a special subcommittee of the advisory committee had been appointed to restyle the habeas corpus rules (*i.e.*, the Rules Governing Section 2254 Cases in the United States District Courts and the Rules Governing Section 2255 Proceedings in the United States District Courts). He said that the advisory committee wanted to make sure, before proceeding, that the project has the approval of the standing committee.

By voice vote, the committee authorized the advisory committee to proceed with its restyling of the habeas corpus rules.

Information Items

Judge Davis reported that the advisory committee had published a restyled revision of the complete body of 60 criminal rules. Public comments are due by February 15, 2001, and the advisory committee will seek approval of the revisions at the June 2001 standing committee meeting. Judge Davis noted that the advisory committee is proposing substantive changes to 10 rules, and they have been published in a package separate from the style revisions.

Judge Davis proceeded to describe a few of the proposed substantive changes and asked the members for their initial reactions and input

FED. R. CRIM. P. 5 and 10

Judge Davis explained that the amendments to Rules 5 and 10 would authorize a court to conduct an initial appearance or arraignment by video conferencing with the defendant's consent. An alternate version of each rule would allow video conferencing without consent.

Judge Davis said that the committee had received negative comments on allowing video conferencing without consent, especially with regard to initial appearances. The Association of the Bar of the City of New York, for example, has pointed out that the initial appearance is normally a defendant's first meeting with his or her lawyer and in-person contact between the two at the initial appearance is essential.

Judge Davis emphasized that the proposed amendments do not mandate video conferencing. A court may require that all proceedings be held in open court, and the great majority of proceedings undoubtedly will continue to be held in a courtroom. He added that the district judges of the Fifth Circuit had expressed strong support for the proposals at a recent meeting. Several of the judges sit along the Texas border, often by designation, and they expressed the view that video conferencing would save money and relieve the marshals of serious problems in moving prisoners. Judge Davis also noted that a comment had been received from a judge in Wyoming strongly approving the amendments because of the great distances in his state.

One of the members reported that he currently uses video conferencing with the consent of the defendant and that it works very well. He said, though, that he would like to have the option of proceeding without consent. Another member said that amended Rule 10(b), allowing a defendant to waive arraignment altogether, would be particularly beneficial and might obviate the need for video conferencing of arraignments.

FED. R. CRIM. P. 32

Judge Davis explained that the current rule requires a judge to rule on all objections to a presentence report. The advisory committee would amend the rule to require that a judge rule only on "material" objections. He noted that the advisory committee had added language to the proposed committee note explaining that an objection is material if it affects the treatment that a prisoner will receive from the Bureau of Prisons.

Judge Davis said that the proposed amendment had encountered a good deal of criticism from the district judges of the Fifth Circuit at their recent meeting. They pointed out that judges simply do not know what the Bureau of Prisons considers relevant for its own purposes. Moreover, they said that there is often insufficient information in the record for a judge to make an informed decision on every material objection. Judge Davis added that the advisory committee may have to make modifications in the rule or committee note to meet these objections.

Some participants suggested that the committee note be expanded to give a trial judge more guidance and flexibility. But, they added, it is very difficult to define a broad term such as "material" and to address all possible contingencies.

Some participants voiced opposition to the proposal on the ground that judges should not be required to conduct hearings or make findings on issues not relevant to the sentence itself. They said that judges do not have the time or obligation to verify information for the Bureau of Prisons. Others pointed out, though, that judges, when actually presented with issues important to a prisoner's treatment, do in fact resolve them and remove inappropriate or inaccurate information from a presentence report.

FED. R. CRIM. P. 41

Judge Davis reported that Rule 41 would be amended to expand a court's authority to issue warrants. It would allow a magistrate judge to sign a warrant giving law enforcement authorities permission to enter premises and covertly observe persons or property for a brief or continuous period. The amendment requires the government to give notice to the owner of the property within seven days, but the notice may be delayed for good cause.

Judge Davis pointed out that two circuit courts of appeals had authorized covert warrants. He said that a survey of magistrate judges conducted for the advisory committee revealed that the magistrate judges strongly prefer to have their authority set forth clearly in a rule than to rely on limited case law.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Shadur presented the report of the advisory committee, as set forth in his memorandum of December 1, 2000. (Agenda Item 9)

Judge Shadur noted the Advisory Committee on Evidence Rules had been re-established in the 1990s after a two-decade gap in its existence. The committee conducted a comprehensive review of the entire body of evidence rules and adopted a policy that changes in the evidence rules should be held to a minimum. He added that there has been a substantial turnover in the membership of the advisory committee in the last year or two. Nevertheless, the committee continues to adhere to the position that changes in the evidence rules should be limited.

Judge Shadur also reported that the advisory committee has a project underway to consider the *possibility* of codifying some aspects of the law of privilege.

One member pointed out that the Federal Rules of Evidence cover at most half the law of evidence. He recommended that the advisory committee address problems not currently covered by the rules. He noted, for example, that the rules do not address impeachment by inconsistent statements. He said that it would be very helpful for

lawyers to have all the principles of evidence, or at least the most important ones, covered in the Federal Rules of Evidence

Judge Shadur responded that the advisory committee considers these issues on a case-by-case basis, but its clear preference is not to make changes unless essential. Professor Capra added that most of the problem areas are covered adequately in case law. In addition, Judge Shadur announced that the Federal Judicial Center, with the help of Professor Capra, had just published *Case Law Divergence from the Federal Rules of Evidence*, which will be widely available to judges and lawyers.

Judge Shadur reported that the advisory committee is presently considering some specific amendments, which he asked Professor Capra to describe.

FED. R. EVID. 608(b)

Professor Capra noted that Rule 608(b) currently prohibits the admission of extrinsic evidence when used to impeach the "credibility" of a witness. But the Supreme Court has ruled that extrinsic evidence may be used to impeach on other grounds, such as bias. He said that the advisory committee is considering substituting the term "character for truthfulness" for "credibility" in Rule 608(b). This, he said, would reflect the original intent of the drafters of the rule.

FED. R. EVID. 804(b)(3)

Professor Capra said that Rule 804(b)(3) provides a hearsay exception for declarations against penal interest. It requires a defendant in a criminal case to provide corroborating circumstances clearly indicating the trustworthiness of the declaration before it may be admitted in the defendant's favor. The rule, though, does not cover declarations against penal interest offered by the government. He said that the advisory committee has agreed to change the corroborating evidence requirement to apply uniformly to all declarations against interest.

FED. R. EVID. 902

Professor Capra reported that the advisory committee had reviewed a Department of Justice proposal to amend Rule 902 and allow self-authentication of public documents to be made by certification, as well as by seal. He noted that the committee had made a preliminary decision not to proceed with an amendment unless the Department can further demonstrate that the current requirement of a seal imposes substantial burdens. Mr. Pauley added that it does not appear that there are major problems in practice.

FED. R. EVID. 1101(d)

Professor Capra reported that the advisory committee is examining Rule 1101(d) to determine whether the list of proceedings to which the evidence rules are inapplicable should be expanded to reflect case law.

REPORT OF THE SUBCOMMITTEE ON ATTORNEY CONDUCT RULES

Judge Scirica reported that the committee's consideration of possible national attorney conduct rules grew out of the local rules project, which has had the goal of promoting national uniformity and reducing or eliminating inconsistent and inappropriate local rules. He said that the local attorney conduct rules in the federal courts vary enormously: (1) among the federal courts nationally; and (2) between federal courts and state courts within the same state. In addition, he said, research conducted for the committee by Professor Coquillette and the Federal Judicial Center had demonstrated that district courts often ignore their own attorney conduct local rules and rely either on state rules or a kind of federal common law.

Judge Scirica noted that a second reason for considering national rules is that Congress may pass legislation requiring the Judicial Conference to recommend uniform federal rules governing the conduct of attorneys. One bill, sponsored by Senator Leahy and supported by Senator Hatch, would require the judiciary to submit two reports. The first, due within one year, would contain recommendations for a uniform national rule on communications by federal government attorneys with represented persons. The second, due within two years, would contain recommendations for rules addressing any other existing conflicts between government attorneys' investigative and prosecutorial duties and their professional responsibility standards.

Professor Coquillette noted that the standing committee had appointed an attorney conduct subcommittee that includes members from the advisory committees and some other Judicial Conference committees. Chief Justice Veasey, Professor Hazard, and several representatives of the Department of Justice participate in the subcommittee's meetings and activities. He reported that the subcommittee had also convened conferences with representative segments of the bar to discuss the advisability of federal attorney conduct rules. He said that the subcommittee is striving for broad consensus, and it acknowledges that there will be no rule, and likely no statute, on federal attorney conduct unless all the major players are satisfied.

Professor Coquillette said that a general consensus prevails on two broad principles:

1. the states have the basic responsibility for regulating the licensing and conduct of all attorneys; and

2. the federal courts must have authority to regulate procedure in their own cases and the admission of attorneys who practice before them.

Professor Coquillette said that after extensive deliberation and outreach, the subcommittee's options have come down to two: (1) to do nothing; or (2) to adopt a single Federal Rule of Attorney Conduct embracing "dynamic conformity," *i.e.*, specifying that a federal court should look to the law of the state in which it sits for rules of professional responsibility. The subcommittee, he said, will consider six variations of a dynamic conformity rule, drafted by Professor Cooper, at its meeting on January 16, 2001. He proceeded to summarize the alternatives, as set forth in Agenda Item 10.

Professor Coquillette explained that the first variation of a potential Federal Rule of Attorney Conduct 1 is very sophisticated, addresses all the key problems, and applies to the courts of appeals, as well as the district courts. It states that federal law, rather than state law, governs all matters of procedure in the federal courts. Alternatives 2 through 6 are progressively simpler. Alternative 2 requires a specific order from a federal court to exempt an attorney from a state professional responsibility rule. Alternative 3 contemplates a *post facto* federal court order to protect an attorney from state sanction after the state had acted against the lawyer.

The last, and simplest rule, would state only that the professional responsibility of an attorney for conduct in connection with an action or proceeding in a federal district court is governed by the rules applicable to an attorney admitted to practice in the state where the federal court sits. Professor Coquillette explained that the argument for a bare bones dynamic conformity rule is that state courts simply do not impose sanctions on attorneys for doing things authorized by federal judges. And federal judges do not impose sanctions that affect a lawyer's right to practice in a state.

Professor Coquillette pointed out that the Department of Justice is not opposed to the concept of dynamic conformity with state attorney conduct rules. But it wants to protect its attorneys against potential state action when they are pursuing legitimate federal interests, such as criminal investigations. He said that the Department would like to have additional federal attorney conduct rules covering a few issues of particular importance to federal government attorneys, including contact with represented parties. Professor Coquillette suggested that these issues might be incorporated into a potential Federal Rule of Attorney Conduct 2.

The bankruptcy courts, he said, have unique issues that need to be addressed separately. The multiplicity of parties and claims in bankruptcy cases, he noted, gives

rise to special conflict issues, and the Bankruptcy Code itself defines "disinterestedness" of professionals. He said that the Advisory Committee on Bankruptcy Rules is studying the problems of attorney conduct in bankruptcy cases and proceedings, and any recommendations it produces might be adopted eventually as Federal Rule of Attorney Conduct 3.

Several participants stated that the federal courts cannot allow the states to regulate federal procedure under the guise of state ethics law. One member pointed out that the problem transcends the overlapping of procedure and conduct. He said that federal substantive interests could be crimped by state bar authorities through the use of professional responsibility rules. He said, therefore, that it is essential to build into the proposed Federal Rule of Attorney Conduct 1 an opportunity for judges on a continuing, common-law basis to protect federal interests, while preserving the presumption that state law governs.

Another participant agreed strongly and argued that giving a "blank check" to state bar authorities would increase balkanization of the federal courts. He said that the bar in his state has been irresponsible in enforcing attorney conduct rules. Another participant suggested that any dynamic conformity rule must contain an exception broad enough to encompass some matters that may not be strictly procedural. Federal judges, he emphasized, must have the right to control what goes on before them. Just because a lawyer may do something that is allowed by a state court is not sufficient. A federal court must retain the option of imposing stricter requirements on the attorneys appearing before it.

One member added that dynamic conformity is the only workable option, but the committee should not adopt any rules at this point, particularly since there are continuing differences between the Department of Justice and the states. He noted that the Department, the American Bar Association, and the Conference of Chief Justices will soon resume negotiations over ABA Rule 4.2 on contact with represented parties. If they are able to reach agreement, he said, the committee could at that point consider proceeding with a dynamic conformity rule.

REPORT OF THE TECHNOLOGY SUBCOMMITTEE

Ms. Miller presented a demonstration of the Administrative Office's revised Internet home page for the federal rules.

Mr. Lafitte and Professor Capra then presented the report of the subcommittee, as set forth in their memorandum and attachments of November 29, 2000. (Agenda Item 11) Mr. Lafitte said that the subcommittee would report on three items: (1) the status of

the Case Management/Electronic Case Filing Project; (2) privacy issues raised by posting court files on the Internet; and (3) local rules for electronic filing.

1. Case Management/Electronic Case File Project

Mr. Lafitte stated that the technology subcommittee's highest priority is to assist in implementing the Case Management/Electronic Case Files project (CM/ECF) by monitoring operation of the system in the pilot courts, cataloging problems, and identifying potential rules issues.

Ms. Miller reported that CM/ECF is a joint project of the Administrative Office and the courts designed to replace the current, ageing electronic docket and case management systems and to provide the courts with enhanced functionality. Among other things, the CM/ECF system: (1) allows courts to maintain their case files in electronic form; (2) makes it possible for attorneys to file documents with the court electronically; (3) provides instant docketing; (4) gives parties in a case instant notice of all filings in the case; (5) provides simultaneous access to the files for bench and bar from remote locations; and (6) allows public access to case files through the Internet.

Ms. Miller said that nine prototype courts are using CM/ECF, and an additional 12 courts are ready to go live on the system. More than a million documents have been filed in the system to date by about 4,000 participating lawyers. The bankruptcy court version of the software, she said, is on the verge of being deployed nationwide, and the district court version will likely be ready for deployment in the following year. A system for the courts of appeals will then follow the district court system.

Ms. Miller reported that there are local rules implications for courts adopting the full electronic case file system. The national rules, she said, simply authorize a court by local rule to permit papers to be filed, signed, or verified by electronic means. All the details are left to the individual courts. In addition, effective December 1, 2001, the federal rules will authorize electronic service.

2. Privacy Concerns

Mr. Lafitte reported that the Court Administration and Case Management Committee has a Subcommittee on Privacy and Electronic Access to Case Files. He serves as a liaison member from the rules committee, and Professor Capra provides important assistance. He reported on the various, and competing, policy options under consideration by the subcommittee for dealing with public electronic access to case files, as elaborated in Agenda Item11. He noted that the issues are very difficult, complex, and controversial, and the subcommittee has not reached a consensus. The subcommittee is seeking public comments on the various options, with a deadline of January 25, 2001.

The subcommittee, he said, expects to make recommendations to the Court Administration and Case Management Committee in the spring, and the full committee expects to seek action from the Judicial Conference at its September 2001 meeting.

3. Local Rules

Professor Capra reported that he is contributing to the work of the Court Administration and Case Management Committee's special Subcommittee on Electronic Filing Rules, which includes two liaison members each from the rules committee and the Committee on Automation and Technology. The goal of the subcommittee, he said, is to assist the courts in adopting the electronic filing system. As its first task, it has prepared a matrix of the local rules and orders of the pilot CM/ECF courts. He noted that most of the procedural details of the pilot courts are set forth in court orders or procedural manuals, rather than rules of court.

Professor Capra said that the subcommittee is now engaged in the second stage of its work — fact finding. It is interviewing interested parties in the prototype courts — including judges, lawyers, U.S. attorneys, U.S. trustees, and local rules committees — to identify issues and explore how well the local rules and procedures are working in practice.

The third phase of the subcommittee's work will be to draft model local rules to assist the courts in electronic filing. The rules, he said, will have to be general in nature because of rapidly changing technology.

A possible fourth phase of the subcommittee's work might be to suggest suitable amendments to the national rules.

Professor Capra explained that most of the issues encountered in the pilot courts are not truly rules issues. Rather, they are conceptual or technological in nature. He pointed out that lawyers are required by the rules to sign and file documents. In the paper environment, signature and filing are two separate acts. But with electronic filing, the two acts are intertwined. A document is submitted to the court from a lawyer's office, filed, and docketed electronically, all using the lawyer's password. Although lawyers generally prepare the papers themselves, they commonly give their password to a member of their staff to file the documents with the court electronically. There are Rule 11 implications to the practice, and the U.S. trustees are very concerned about it.

Another issue facing the courts is the appropriate way to handle attachments and exhibits in the electronic system. These documents are usually not prepared by the lawyers themselves and exist in hard copy, rather than electronic form. Some, such as leases in bankruptcy cases, may be several hundred pages long. Scanning them into a

computer system takes time, may cause errors, and takes up considerable space on the court's computers. Professor Capra noted that the bankruptcy court in the Southern District of New York had advised the bar to scan only excerpts of these documents into the computer system. But the lawyers were not comfortable with the process and continued to file the entire, lengthy documents. Thus, many of the benefits of the electronic system were negated in practice.

Professor Capra also alluded to the need to adopt some sort of filtering technology to enable lawyers easily to separate important court notices from the mass of electronic mail that they receive in the course of their daily practice. He also pointed out that CM/ECF currently lacks a batch filing process, and every case must be filed individually.

Judge Scirica emphasized that the rules committee shares a jurisdictional interest in electronic filing with the Court Administration and Case Management Committee and the Automation and Technology Committee. He noted that he had been in contact with the chairs of those committees, and they have agreed that the court administration committee should take the lead in developing guidance for the courts on electronic filing, even though rules are clearly implicated. He added that it was unlikely that there would be new national rules on electronic filing for several years, if ever.

REPORT OF THE LOCAL RULES PROJECT

Judge Scirica said that the local rules project had been initiated in the 1980s at the behest of Congress, which had expressed concerns that local rules evade the Rules Enabling Act. Unlike national rules, Congress does not have an opportunity to consider local rules before they take effect. In addition, he said, the bar has complained continuously to Congress about the proliferation and wide variations of local federal court rules.

Professor Coquillette added that the American Bar Association, through its Litigation Section, has made it a priority of the organization to reduce the number of local rules to make it easier for attorneys to practice in different jurisdictions. The key issue, he said, is whether the wide variations embedded in local court rules undermine the basic concept of a single federal court system.

Professor Coquillette noted that the standing committee had turned to Professor Squiers in the 1980s — who was on the Boston College Law School faculty at the time — to conduct a study of all local rules, starting with district court civil rules. She prepared a report for each district court and court of appeals that resulted eventually in eliminating many duplicative and inconsistent local rules. The study also identified a

number of good local rules that were referred to the advisory committees as a source for new, uniform national rules. In sum, the project was a major success.

But, Professor Coquillette added, the Civil Justice Reform Act, enacted in 1990, encouraged and formalized local procedural experimentation in the district courts and led to a large number of new local rules. The Act has expired, and Congress is again expressing concern over local rules. The committee, he said, shares the concerns of Congress, and it has adopted amendments: (1) requiring uniform numbering of local rules to correspond with the national rules; and (2) prohibiting judges from sanctioning an attorney for procedural violations unless the attorney has actual notice of the procedure or it is contained in a local rule.

Professor Coquillette stated that the committee has authorized Professor Squiers to conduct a new local rules study in the aftermath of the expiration of the Civil Justice Reform Act.

Professor Squiers presented the report of the local rules project, as set forth in her memorandum of December 5, 2000. (Agenda Item 12) She explained that she is using the same basic format for the current project that she used for the last study. She has gathered the local rules, entered them into a computerized data base, and catalogued them in several different ways to facilitate comparison and analysis. She said that she has begun writing a report and should present the product to the standing committee at its June 2001 meeting. She added that her initial impression is that there are more local rules than ever, but fewer inconsistencies with the national rules. She noted that many of the new rules deal with alternative dispute resolution.

Professor Squiers reported that her survey of circuit executives has revealed that there is an active process in place in each circuit to review local court rules. It consists in every case of an initial review by the circuit executive's office, followed by referral to a deliberative body such as the circuit council or a special committee. Problems with local rules, she said, are typically resolved through dialog between the circuit and the court, and it is rare for a local rule to be abrogated formally by the circuit council.

LONG RANGE PLANNING

Judge Scirica reported that the chairs of several Judicial Conference committees meet together as a long range planning committee at each Conference session. He pointed out that has informed them that the primary planning concern of the rules committees is to preserve the integrity of the Rules Enabling Act process and discourage Congress from getting involved in rulemaking.

He noted that one issue that attracted considerable attention at the September 2000 meeting was the continuing decline in the rate of civil and criminal trials in the district courts. He reported that the participants at the long range planning meeting had expressed the view that decline in criminal trials is due to the sentencing guidelines and mandatory minimum sentences, which have resulted in more guilty pleas. In civil cases, he said, the causes are more diverse. The participants pointed to the emphasis of the federal courts on case management and settlement, coupled with the interests of litigants in avoiding costs and delay. One of the members suggested that the greater use of summary judgments in civil cases, following the Supreme Court's trilogy of cases in 1986, has been a major factor. He said that once discovery is complete, it is common for the lawyers to seek summary judgment, rather than trial. Judge Scirica asked the participants to think about the matter and provide him with any additional insights they may have.

NEXT COMMITTEE MEETING

The next committee meeting has been scheduled for Thursday and Friday, June 7-8, 2001, in Philadelphia.

Respectfully submitted,

Peter G. McCabe
Secretary